No. 89-1238

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

STEAD MOTORS OF WALNUT CREEK,
Petitioner,
v.
AUTOMOTIVE MACHINISTS LODGE NO. 1173,
INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE[1]

A. Gale Rocks was employed for seven years by Stead Motors, a Mercedes-Benz automobile dealer and service shop. For a time, Mr. Rocks was a union steward, and

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[1] The record before the district court consisted only of the arbitrator's decision and the pertinent collective bargaining agreement.

was regarded by management as overzealous in carrying out his union duties.

From 1977 until 1984, Mr. Rocks performed his duties satisfactorily, and was not subject to any disciplinary action or warning. In 1984, Mr. Rocks was given a written warning for failing properly to tighten the lug bolts on the wheels of a Mercedes-Benz car. (The record does not contain any explanation of precisely what a "lug bolt" is on a Mercedes, or explicate the likely consequence of failing properly to tighten such a bolt.) The company did not discharge Mr. Rocks for his actions, instead issuing him a written warning, which, according to the terms of the colective bargaining agreement, remained in effect for only thirty days.

About a year later, Mr. Rocks was terminated by the company after an incident in which loose lug bolts led to a customer complaint of a vibrating car. The union filed a grievance over his termination. Because the grievance was not settled between the union and management, it was submitted to a neutral arbitrator pursuant to the collective bargaining agreement.

At the arbitration hearing, Stead Motors explained that it had discharged Mr. Rocks for three reasons:

> (1) Grievant experienced the same problem and received a warning the year previously; (2) Grievant had continual problems working with supervision (i.e. his attitude); (3) Grievant's conduct was "reckless" as defined in Webster's Dictionary and the Employer had great liability exposure if such conduct was repeated and someone was injured. [Pet. App. A-37.]

Thus, the company's position before the arbitrator was that the collective bargaining agreement permitted the discharge. The company raised no public policy considerations before the arbitrator.

Of the three factors relied upon by the company, the arbitrator determined, as to the first, that the warning

was not a proper basis for the discharge, since the warning had, by its own terms, expired eleven months before; as to the second, that the reliance on "attitude problems" was unwarranted; but as to the third, that Rocks was indeed "reckless" on that occasion. Because of the employer's "failure to establish that pursuant to the contract it was justified in relying on *each* of the [three] factors" (emphasis supplied), the arbitrator, while acknowledging that Rocks' "reckless conduct on October 14, 1985 [] warrants severe discipline," concluded "that discharge is too severe." Pet. App. A-7.

The arbitrator therefore reinstated Mr. Rocks, but imposed a long, one-hundred and twenty day suspension without pay. The arbitrator was of the view that such a suspension "should serve as an object lesson and impress upon the Grievant that he is required to follow instruction, and perform his job duties fully and carefully." Pet. App. A-8.

B. The company sought to vacate this arbitration order on the ground that the arbitrator was not entitled, under the contract, to reinstate a employee who had been "reckless," and also on the ground that the reinstatement violated public policy. The district court rejected the first argument but sustained the second. Pet. App. A-59.

The Court of Appeals for the Ninth Circuit, sitting en banc, decided, 9-2, that under this Court's decisions in *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983), and *United Paperworkers Intern'l Union v. Misco*, 484 U.S. 29 (1987), the district court erred in vacating the arbitration award on public policy grounds. There was, however, no majority opinion for the court, and there was both substantial agreement and some significant disagreement between the five-judge plurality opinion, written by Judge Reinhardt, and the four-judge concurring opinion, authored by Judge Wallace.

Specifically, both the plurality and the concurring opinion note that *W.R. Grace & Co.* and *Misco* require

that before vacating an arbitration award on public policy grounds, a court must determine that the award violates a public policy that is "explicit", "well defined and dominant", and demonstrated "by reference to the laws and legal precedents" and not only by "general considerations of supposed public interests." Both the plurality and the concurring opinion conclude that this threshold requirement was not met any more in this case than it was in *Misco*. Pet. App. A-20, A-32-33 (plurality opinion); *id.* at A-48-49 (concurring opinion).

The plurality, in an extensive discussion, and the concurrence, in passing, also expressed the view in *dicta* that under *Misco*, the relevant public policy must be one that disapproves the *reinstatement* of the employee in question, and not simply "the underlying act for which the employee was disciplined." Pet. App. A-30-31; Pet. App. A-54. At the same time, the plurality expressly declined to decide the question left open in *Misco*, whether "enforcement of the award would actually violate 'a statute, regulation or other manifestation of positive law'" (Pet. App. A-24-25 n.12), and the concurring opinion did not address that question either.

The plurality and the concurrence disagreed, however, upon another legal point. The plurality stated that a court should defer to an arbitrator's decision to reinstate an employee where the arbitrator makes a determination, explicit or implicit, that the employee is amenable to discipline short of discharge. The concurring judges disagreed with this analysis. Pet. App. A-25-34; *id.* at A-49-54.

ARGUMENT

In its Petition for Writ of Certiorari, the company puts forward three "questions presented" which it maintains are raised by the Ninth Circuit opinion and merit plenary consideration by this Court. None of those questions, however, concern the issue which was *actually* determinative in both the plurality and concurring opin-

ions below: whether or not there is a sufficiently explicit and dominant California public policy expressed in state statutory laws and precedents to merit invocation of the public policy doctrine at all. And that issue is one which does not merit this Court's attention, since the Ninth Circuit's conclusion upon that issue involves no circuit conflict or conflict with this Court's cases but, instead, concerns a mixed question of law and fact resolved entirely by reference to State law and the particular facts of this case.

Moreover, of the three questions that *are* presented in the Petition, the first was explicitly not reached in this case by the Court of Appeals; the second was addressed only as *dicta*, and would not be properly before this Court were certiorari granted; and the third was answered differently by the plurality and concurring opinions below, and therefore is a question upon which there is no decision of the Ninth Circuit applicable in later cases.

1. The concurring opinion in the Court of Appeals summarized the core of the holding below as follows:

> [T]he Court in *Misco* articulated two "threshold" requirements which must be met before a court may refuse to enforce an arbitrator's award on public policy grounds . . . The first threshold requirement—proper "framing" of the public policy . . . —itself has two components: (1) the purported policy must be well-defined, dominant and explicit, and (2) the policy must be grounded in "laws and legal precedents" rather than in "general considerations of supposed public interests." *W.R. Grace*, 461 U.S. at 766 . . .
>
> I conclude, with the plurality, that because Stead Motors's formulation of the public policy at stake fails to meet *Misco*'s first threshold requirement, we must reverse. The original panel accepted Stead Motors's invocation of California's alleged "strong public policy favoring the proper maintenance and re-

> pair of motor vehicles." Applying the first threshold requirement under *Misco*, the plurality holds that "[w]e have found nothing in the record of this case, in the arguments of counsel, or in our inquiry into the 'laws and legal precedents' of California which supports the existence of the specific public policy necessary to justify vacating the arbitral award in this case." *Id.*, at 1216. The plurality reasons that the two sections of the California Code identified by Stead Motors do not "constitute the sort of laws and legal precedents necessary for the valid expression of an 'explicit, well defined and dominant' public policy." *Id.*, at 1216. In other words, such a policy cannot be "gleaned from [the] two sections of the California Code" cited by Stead Motors. *Id.* at 1204; *see also id.* at 126. As the party seeking to have the award vacated, Stead Motors bears the burden of demonstrating, at the outset, the existence of a well-defined, dominant and explicit public policy which is sufficiently rooted in laws and legal precedents rather than in general considerations of supposed public interests. I agree with the plurality that Stead Motors has not carried this burden. [Pet. App. A-49.]

As the concurring opinion further noted, "this should end this case." *Id.* The Petition does not seek review of this determinative aspect of the Court of Appeals' decision, no doubt because the question whether the particular public policy relied upon in this case was sufficiently established by reference to California laws and legal precedents to warrant invocation of the 'public policy' exception involves the application in a particular context of the general principles already enunciated in *W.R. Grace & Co.* and *Misco*, rather than any undecided legal issue. Further, whatever disagreement there may be among the federal courts of appeal as to *other* aspects of the public policy doctrine, there is no conflict asserted regarding the manner in which the applicable public policy must be established. And the question whether or not the Court of Appeals in this case properly surveyed Cali-

fornia statutes, regulations, and case law in coming to the conclusion that there is no explicit, dominant public policy favoring the proper maintenance of motor vehicles is essentially one of state law, and therefore not worthy of certiorari.[2]

In short, the major point upon which the plurality and the concurring opinions agreed, and which was, as the concurring opinion recognized, sufficient to decide the case against petitioner, is one which is not questioned in the petition, and which would in any event not support the grant of a petition for certiorari. The petition therefore should be denied. As we now demonstrate, none of the questions presented would even be reached were the Court to grant the petition.

2. The first question presented by the Petition is whether the public policy exception applies "only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by an employer that would violate such a law?" Petition, at (i). That question is precisely the one this Court declined to decide in *Misco*, because the public policy relied upon in that case was for other reasons not sufficiently established, and because no violation of the policy that was articulated was "clearly shown."[3] 108 S. Ct. at 374 n.12 ("We need not address the Union's position that a court may refuse to enforce an award on public policy grounds only when the award itself violates a state, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law."). And it is also the question that plurality

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[2] This Court ordinarily accepts the view of the Court of Appeals as to questions of state law. *Cf. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985), and cases cited; *Chardon v. Fumero Soto*, 462 U.S. 650, 654-55 n.5 (1983); *Butner v. United States*, 440 U.S. 48, 57-58 (1979).

[3] As we have shown, it is true in this case as well that, apart from the question left open in *Misco*, the public policy articulated by the company was not properly proven. *See* pp. 5-6, *supra*.

opinion in this case explicitly left open, for similar reasons:

> There is no reason for us here to consider, and we therefore leave open, the question reserved by the *Misco* court: whether a party attempting to show that an arbitrator's award contravenes public policy must demonstrate that enforcement of the award would actually violate "a statute, regulation or other manifestation of positive law." [Pet. App. A-24-25 n.12.]

There is, concommitantly, no reason for this Court to grant certiorari to review a question that was not decided by the court below, and which the Court could not even reach unless it reversed the appellate court's state-law ruling, not challenged here.

3. The company's second "Question Presented" is whether the courts' authority to vacate arbitration awards on public policy grounds is "limited to those situations where the articulated pubilc policy specifically prohibits reinstatement." Petition, at (i). As to that question, there is some divergence among the federal courts of appeal, and the Ninth Circuit in this case expressed a view in tension with certain language in cases of at least two other courts of appeal. *Iowa Electric Light & Power Co. v. Local Union 204, International Bhd. of Electrical Workers*, 834 F.2d 1424 (8th Cir. 1987); *Delta Air Lines v. Airline Pilots Assoc. Int'l*, 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 110 S.Ct. 201 (1989). The plurality determined, however, that it is possible to read the Eighth and Eleventh Circuit opinions as based upon an explicit public policy against employment of the individual in question, and not simply a public policy condemning the action upon which discipline was based. Pet. App. A-28-29. So read, the Eighth and Eleventh Circuit cases are not in conflict even with the *dicta* in the opinions below.

This case, moreover, does not provide this Court an opportunity to decide whether, as petitioner maintains,

an award can be vacated as against public policy grounds whenever the action for which the employee is disciplined is in conflict with a properly determined public policy, even if the law leaves the employer free to employ an employee who engaged in that action if the employer so chooses. For, as recounted above, the Ninth Circuit *first* concluded that there was no properly determined public policy *of any variety* in this case, and the question whether that is true or not is neither within the questions presented to this Court nor appropriate for plenary consideration. *See* pp. 5-6, *supra*. As a result, if *certiorari* were granted, this Court would never reach the question as to which there is some uncertainty in the courts of appeal. Rather, as in *Misco*, the Court would be forced to conclude that the *first* threshold requirement, that there be a properly ascertained public policy, is not met. *See* concurring opinion at A-54 (any differences between the plurality opinion and *Delta Air Lines* and *Iowa Electric Light* are irrelevant since "in both cases *Misco*'s first threshold requirement is met—here it is not.").[4]

4. Petitioner's final "question presented" is whether the decision of a labor arbitrator reinstating a discharged worker is "a finding of fact on the issue of the

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[4] We note in addition that the second reason why this Court in *Misco* was not able to proceed to determine the precise reach of the public policy exception governs here as well: As in *Misco*, "[e]ven if the [petitioner's] formulation of public policy is to be accepted, no violation of that policy was clearly shown in this case." 108 S.Ct. at 374. In the first place, there is nothing in the record to indicate that the failure properly to tighten lug bolts on a Mercedes (which, it appears, are not the same thing as the lug *nuts* on other cars) creates an especially dangerous situation, as opposed to one which simply affects the comfort of the driver and passengers. Secondly, nothing in the arbitrator's award compels Stead Motors to assign Gale Rocks once reinstated to any job involving lug bolts. Rather, the company can reemploy him as a mechanic, but assign him to jobs where there is little chance to affect public safety—for example, doing lubrications or tune-ups.

worker's amenability to discipline which is immune from review by the federal courts." Petition at (i). There is, however, no holding of the Court of Appeals on this question. Rather the plurality and concurring opinions contain conflicting *dicta* on this subject. While the plurality opinion suggested that deference was appropriate, the concurrence explicitly disagreed, maintaining that:

> [t]he plurality's 'amenability to discipline' discussion is unnecessary to our decision, unwarranted by the final paragraph in *Misco*, and wrong. Since there already exists another reason to reverse, we need not and should not address this problematic one as well. [Pet. App. A-54.]

The third question presented by the Petition is therefore one which was not in fact decided by a majority of the court below, and which remains an open question for future litigation in the Ninth Circuit.[5] There is consequentially no holding of the court of appeals on this issue for this Court to review on certiorari.

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[5] In any event, in this case there is no factual record upon which to challenge the arbitrator's conclusion that the "suspension should serve as an object lesson and impress upon grievant that he is required to follow instructions and perform his job duties fully and carefully." Pet. App. A-8.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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